THE AMERICAN

LAW REGISTER

FOUNDED 1852

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 53 O. S. / 44 N. S. } SEPTEMBER, 1905. No. 9.

THE EXCLUSIVENESS OF THE POWER OF CONGRESS OVER INTERSTATE AND FOREIGN COMMERCE.

The commerce clause of the Federal Constitution has been a constant source of disagreement among the justices of the Supreme Court of the United States. Decisions have not always been harmonious. And in nearly every case at least one, and in many cases several, dissenting opinions have been filed.

The principal question in dispute has been whether the grant of commercial power to Congress is exclusive of all direct power over interstate and foreign commerce upon the part of the states, or whether the states have concurrent power thereover with Congress.

Power over interstate commerce is granted by the same words as power over foreign commerce. No logical distinction can be made between them. Yet, although it is generally admitted that the power of Congress over foreign commerce is exclusive, three different theories have been advanced in the opinions of the court as to the power of Congress over interstate commerce.

First: That Congress has exclusive power over all interstate commerce.

Second: That Congress and the states have general concurrent power over all interstate commerce.

Third: That Congress has exclusive power over national, and Congress and the states concurrent power over local matters of interstate commerce.

Yet because the second theory was soon generally abandoned, and the first and third lead to the same results in most cases, they do not seem to have been clearly recognized as distinct theories, nor is the inconsistency of the reasoning which supports them appreciated. Just as the Federalist and strict constructionalist interpretations of the Constitution seldom take distinct shape in the opinions, yet are clearly recognizable in them, so these theories, which, indeed, resulted from these conflicting interpretations, are traceable perhaps more frequently as fundamental reasoning than as formulated theories.

This failure to fully recognize them as distinct theories has caused no little confusion of reasoning, beclouding the whole subject, and has resulted in considerable inconsistency of decision in those cases where the theories do lead to different results.

This article is an endeavor to clarify the subject by a consideration of the three theories and the reasoning supporting them, and, as a result, to show that only the exclusive theory is sound. Then by tracing the theories chronologically through the opinions of the court, by quotations therefrom, it is sought to let the reader judge for himself whether the court has not substantially acted upon that theory and is free to discard the other two, and that such action by the court would simplify the subject immensely.

The first theory advanced was that the grant of commercial power to Congress is exclusive of all *direct* power over interstate and foreign commerce on the part of the states. It is a corollary or part of this theory that the states may exercise their reserved powers in domestic affairs, such as the regulation of roads, bridges, wharves, ferries, inspection, quarantine, etc., even though they may thereby *indirectly affect* interstate and foreign commerce, provided Congress has not legislated on the same subject.

The theory distinguishes sharply between the sources of power, and between direct and indirect regulation. Power over foreign and interstate commerce is given to Congress. The states cannot directly regulate such commerce, because they would be exercising the very power given to Congress. Power over domestic affairs is reserved to the states and cannot be exercised by Congress (except for a national purpose under a power given to Congress). Yet when the states exercise their reserved powers they indirectly affect or regulate foreign and interstate commerce. In thus exercising their reserved powers they may at times use measures of a similar character to measures which Congress may adopt, but these measures do not flow from the same power. "All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct as to establish their identity." (*Gibbons* v. *Ogden, infra.*) Direct regulation of commerce is based on the power to regulate it; it is the exercise of that power. Indirect or incidental regulation is the exercise of another power from a distinct source which operates in given cases indirectly upon subjects of interstate or foreign commerce. It results from the exercise by a state of a reserved power. It can affect subjects of interstate and foreign commerce only, and not the power of Congress over them, because the power of Congress is supreme. This distinction is important. It follows that when Congress actually exercises its power over the same subjects the indirect or incidental regulation by a state resulting from the exercise of a reserved state power must yield, because the powers of the states cannot override or control the exercise by Congress of its powers.

We may call this for convenience the Exclusive Theory, looked at from the standpoint of Congress, or the Reserved Powers Theory, looked at from the standpoint of the states. This theory was so forcibly set out, it might almost be said

demonstrated, by Chief-Justice Marshall in *Gibbons* v. *Ogden*[1] (1824), the first case involving the commerce clause, that it was subsequently assumed by justices of the court, among them Mr. Justice Story, that this point had been definitely decided and settled.

Other justices, however, pointed out that the actual decision of the case was placed upon other grounds; and thus freeing themselves from binding precedent, proceeded to adopt a theory based on states' rights, which had been previously advanced in the License Cases (1847), that the states have concurrent sovereignty equally with Congress over all subjects of interstate commerce. They asserted that the states could exercise full rights of sovereignty over any and all subjects of interstate commerce until Congress should exercise its sovereignty over the same subject in actual conflict therewith, when the state sovereignty must yield.

Indeed, it was argued that the concurrent sovereignty of the states over commerce was in all respects equal to that of Congress, and need not yield to the latter. Thus early were sown the seeds of the doctrine of nullification. The argument was not, however, adopted by the court.

The theory adopted we shall call the General Concurrent Powers Theory.

This theory was soon found untenable. It is in direct opposition to one of the chief purposes of the commerce clause, which was to secure commerce from the burdens and restrictions of local control. Accordingly, it was soon abandoned. Nevertheless, it was more consistent with the commerce clause than the theory to which it gave birth and which followed it. It disappeared from the opinions entirely until 1876,[2] when three cases were decided upon it. In subsequent cases (1886–1893)[3] these decisions were shown to have been ill-considered on this point and were overruled.

---

[1] 9 Wheaton 1.

[2] *Munn* v. *Illinois*, 94 U. S. 113; *C., B. and Q. R. R.* v. *Iowa*, 94 U. S. 155; and *Peik* v. *Chicago and N. W. Ry. Co.*, 94 U. S. 164.

[3] *Wabash, etc., Ry.* v. *Illinois*, 118 U. S. 557; *Covington, etc., Bridge Co.* v. *Kentucky*, 154 U. S. 204.

Thereupon the theory again disappeared until 1898, when it reappeared as the basis of a decision [4] which seems clearly out of harmony with the main trend of decision.

By an attempted compromise of the exclusive-reserved powers theory and this general concurrent powers theory there was evolved a hybrid theory which we shall call the Local Concurrent Powers Theory.

This theory included a part of the exclusive-reserved powers theory, by admitting that in matters of interstate commerce permitting or requiring but one uniform or national plan or system of regulation the jurisdiction of Congress is exclusive, and direct regulation by the states is void. But it maintained that in matters of local concern, admitting of more than one plan of regulation, the states have direct concurrent powers over interstate commerce with Congress, which they can exercise until Congress acts on the same subject, when the state laws yield, so far as inconsistent with the laws of Congress.

It was first advocated by Mr. Justice Curtis in *Cooley* v. *Board of Wardens of Philadelphia* (1851).[5]

It will be seen that this theory and the exclusive-reserved powers theory agree in placing some subjects within the exclusive power of Congress and beyond the power of the states. Also, that the exclusive-reserved powers theory sustains many local regulations of the states, such as regulations of roads, bridges, wharves, etc., on the ground that they are not direct regulations of interstate commerce, but are the exercise by the states of their reserved powers, only indirectly affecting interstate and foreign commerce; while the local-concurrent powers theory sustains the same regulations, but upon different reasoning; that is, on the ground that they are the proper exercise by the states of their direct concurrent jurisdiction over interstate commerce in local affairs. Consequently, in most cases, the two theories have led to the same result, however inconsistent the reasoning of the justices concurring in the results.

---

[4] *Lake Shore and Mich. So. R. R.* v. *Ohio*, 173 U. S. 285.
[5] 12 How. 299.

There is a class of cases, however, where the two theories have come in direct conflict. This class consists of subjects, such as license requirements for sale of interstate goods, taxation of interstate commerce, and regulation of rates and charges for interstate transportation.

These and similar cases obviously permit of local regulation, and for the most part do not permit of uniform national regulation. On the local concurrent theory they are within the concurrent power of the states, and direct regulation of them by the states is constitutional. On the exclusive-reserved powers theory they are unconstitutional because they are direct regulations of interstate commerce. The conflict of the theories is here a direct one. It has resulted, and is likely to result, in inconsistent decisions.

Yet even here the conflict is more in the reasoning of the opinions than in the decisions of the court. This is due to the facts that the three lines of cases mentioned as examples, license requirements, taxation, and regulation of rates, compose the greater body of cases of this class, and that the court has uniformly, except in one early case, and in the three overruled cases of 1876, and the case in 1898, as above, held direct state regulation of these to be unconstitutional. This is consistent only with the exclusive-reserved powers theory, and is a substantial victory for that theory.

Strange to say, however, this does not seem to be recognized. Opinions based on the local concurrent powers theory conclude with decisions against the constitutionality of state regulations of these subjects without appreciating the inconsistency.

This will be more fully gone into below. Suffice it to say here that, in consequence of early decisions to the effect stated which have been followed as precedents, the actual decisions are, in the main, harmonious, although the greatest conflict of reasoning prevails.

The unfortunate thing is that the conflict of reasoning thus still remains. The court in a decision which is based fundamentally on one theory often cites a prior decision which it approves and desires to follow, and quotes the lan-

guage of the court in that case, although the opinion was based upon the other theory. The two theories are not infrequently confused in one opinion. It is not surprising that the greatest difference of view has existed among the justices, and that the cases contain a remarkable number of dissenting opinions. This confuses the whole subject, leaves the constitutional principles unsettled, and renders doubtful the outcome of any case not controlled by precedent.

The general recognition of the three theories as distinct theories would clarify the subject considerably. It would at least resolve the confusion of reasoning into a clean-cut conflict of theory, which is a very different matter, and would thereby open the way to an express decision in favor of one or the other theory.

Far greater clarification would result, however, should the court recognize that the general concurrent theory is untenable, and that in the only class of cases where the exclusive-reserved powers and the local concurrent powers theories lead to different results, the court has, with comparatively few exceptions, rendered decisions consistent with the exclusive theory only, and has thereby practically adopted that theory.

Should the court so rule, not only would the confusion of reasoning be eliminated, but, also, the conflict of theory would be decided.

There would then be but one basic question in each case: namely, does the power exercised by a state in a given case flow from the power to regulate interstate commerce? If it does, the state law is void. If it does not, but flows from a reserved power, and only incidentally and indirectly affects commerce, it is valid.

On the other hand, if the court has not overthrown the local concurrent theory, the conflict and confusion remain. There are then two basic questions in each case. The first is the same: Does the power exercised flow from a power to regulate interstate commerce? The second is the further question: If it does, is it, nevertheless, such a regulation as the state has power to make, or is it a matter permitting

of only one uniform or national plan of regulation, which the state therefore cannot regulate?

This second question reintroduces the whole contest between the two theories. There are no general principles in the Constitution or in the decisions of the court by which to determine what subjects fall within the local and what within the national class. Consequently each new case raises the whole question and reintroduces the contest.

Proceeding to a general consideration of all three theories, the first inquiry of interest is the historical reason for the grant to Congress of the power to regulate interstate and foreign commerce.

Under the Articles of Confederation the various regulations and taxes of the different states, arising from their various policies, jealousies, and needs of revenue, seriously interfered with commerce between them. Also, the several states found themselves too weak to resist individually the burdensome regulations imposed upon their foreign commerce by other nations.

This disorganized state of affairs demanded that freedom from the burden of local regulations and power to cope with foreign nations be secured by the grant of the power of commercial regulation to Congress.

On this point Mr. Justice Johnson, in a concurring opinion in *Gibbons* v. *Ogden* (*supra*), says:

"And now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, . . . that selfish principle, which, etc., . . . began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the states, and fatal to their commercial interests abroad."

"This was the immediate cause that led to the forming of a convention.

"As early as 1778 the subject had been pressed upon Congress by a memorial from the State of New Jersey; and in 1781 we find a resolution presented to that body by one of the most enlightened men of his day,[6] affirming that

[6] Dr. Witherspoon.

'it is indispensably necessary that the United States, in Congress assembled, should be vested with a right of superintending the commercial regulations of every state, that none may take place that shall be partial or contrary to the common interests.' The resolution of Virginia,[7] appointing her commissioners to meet commissioners from other states, expresses their purpose to be, 'to take into consideration the trade of the United States, to consider how far an uniform system in their commercial regulations may be necessary to their common interests and their permanent harmony.' And Mr. Madison's resolution is introduced by a preamble entirely explicit on this point: 'Whereas, the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities, which cannot fail to arise among the several states, from the interference of partial and separate regulations,' etc., 'therefore, resolved,' etc."

In the case of *Brown* v. *Maryland*,[8] Chief-Justice Marshall says:

"The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten" . . . .

"It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficiency would tend to defeat an object in the attainment of which the American public took, and

[7] January 21, 1786.
[8] 12 Wheaton, 419

justly took, that strong interest which arose from a full conviction of its necessity."

We start then with the historical fact that the commerce clause of the Constitution was framed and intended to take the burdensome power of local regulation from the states. Consequently both the general concurrent and the local concurrent powers theories are opposed to the purpose of the commerce clause. They leave to the states, in whole or in part, the very power the clause was designed to take from them. The very thing asserted to support them—that is, the possibility of local control—is historically the strongest argument against them both.

Following naturally from the purpose for which the clause was enacted is the second historic fact that those who framed the Constitution, and their contemporaries, at once and universally accepted the commerce clause to mean that all power of regulation of interstate and foreign commerce had been taken from the states and vested exclusively in Congress. On this point Mr. Justice Johnson, in *Gibbons* v. *Ogden*, *supra*, says:

"The history of the times will, therefore, sustain the opinion that the grant of power over commerce, if intended to be commensurate with the evils existing and the purpose of remedying those evils, could be only commensurate with the power of the states over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people when the grant was made. There was not a state in the Union in which there did not, at that time, exist a variety of commercial regulations, concerning which it is too much to suppose that the whole ground covered by those regulations was immediately assumed by actual legislation, under the authority of the Union. But where was the existing statute on this subject that a state attempted to execute? or by what state was it ever thought necessary to repeal those statutes? By common consent, those laws dropped lifeless from their statute-books for want of the sustaining power that had been relinquished to Congress."

The freedom from local regulation which it was desired

to secure would easily have been gained had the Constitution been framed and intended to abolish the state governments. But as this was neither the intention nor effect of the Constitution, which formed a nation by the union of states that preserved their identities and much of their individual sovereignty, surrendering a part only thereof to the General Government, it is advisable to consider the general working plan on which the sovereignty was divided between the state and Federal Governments, and by which provision was made for the action and interaction of the two sovereignties, and then to consider how this plan applied to the division of sovereignty over commerce.

Two, and only two, sovereignties are created or recognized by the Constitution, that of the Federal Government and that of the state governments. What powers are not granted to the first are reserved to the second. The Federal Government is sovereign in the exercise of its granted powers, and the states are sovereign in the exercise of their reserved powers. Neither one can directly encroach or overlap upon the sovereignty of the other. But the two sovereignties extend over the same people and are closely interwrought. As a necessary result, neither one can exercise its own powers without indirectly affecting and overlapping upon the persons and subjects over which the sovereignty of the other extends. This must, therefore, necessarily be permitted where there is no direct conflict in the actual exercise of powers. If it were not, neither could exist. Where, however, both undertake to actually exercise powers, each its own, which result in conflict, one or the other must yield. It is accordingly provided in the Constitution that in such cases the states must yield, the Constitution and treaties and laws made thereunder being declared the supreme law of the land.

Sovereignty over commerce is divided between the two governments. To Congress is given sovereignty over commerce with foreign nations and among the several states and with the Indian tribes. To the states is reserved sovereignty, to each respectively, over commerce entirely within its own bounds.

Congress cannot directly exercise sovereignty over the internal commerce of a state, and a state cannot directly exercise sovereignty over interstate and foreign commerce. But commerce is a broad word, including passengers and freight, buying and selling, and intercourse in general. And when Congress actually exercises its power over interstate commerce, or almost any of its other powers, such as taxing, coinage, fixing standards of weights and measures, establishing post offices and roads, etc., it indirectly affects and incidentally regulates the internal commerce of the states. Nevertheless, such exercise of power by Congress is valid. Otherwise, Congress could not exercise its powers at all.

When a state actually exercises its power over its internal commerce or almost any other of its reserved powers, such as taxation, prescribing liability for negligence and other torts, the laws of contracts, the control of bridges and roads and of pilots, the protection of the health and safety of its people, etc., it indirectly affects and incidentally regulates interstate commerce. Nevertheless, such exercise of power by a state is valid. Otherwise, the states could not exercise their powers at all.

Where, however, both Congress and a state undertake to actually exercise powers, each its own, which result indirectly in conflicting regulations of interstate commerce, one or the other must yield, and the Constitution has prescribed that in such case the state must yield to the extent to which its actual exercise of power conflicts with the actual exercise of power by Congress.

With the purpose, then, of freeing commerce from local control, and under this plan of divided sovereignty, the framers of the Constitution formulated the commerce clause, and the states ratified and adopted it.

This clause, so formulated and adopted, has produced so much contention and confusion of reasoning that before we plunge into a consideration of it, it will be well for us to pause and take our bearings, after the example of Daniel Webster when, in opening his reply to Hayne, he said: "When the mariner has been tossed for many days in thick weather, and on an unknown sea, he naturally avails him-

self of the first pause in the storm, the earliest glance of the sun, to take his latitude, and ascertain how far the elements have driven him from his true course. Let us imitate this prudence, and, before we float farther upon the waves of this debate, refer to the point from which we departed, that we may at least be able to conjecture where we now are. I ask for the reading of the resolution before the Senate."

The provision of the Constitution under discussion is:

"The Congress shall have power:

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The words of the grant are general, containing no distinction or division of the subject matter. It grants commercial power to Congress in general terms. Consequently it grants away all or none of the concurrent power of the states. If it grants all, then Congress has exclusive power; if it grants none, then the states retain general concurrent power.

Both the exclusive theory and the general concurrent theory are therefore consistent with the terms of the grant in this respect.

But it is not a divided grant. It does not grant away the concurrent power of the states over some subjects and leave it over other subjects.

The local concurrent theory is therefore absolutely at variance with the terms of the grant.

This seems to have been entirely overlooked in the eagerness of some justices to seize and of others to acquiesce in the last theory as a sort of a compromise and working basis.

Moreover, the court has distinctly stated that the power of Congress over foreign commerce is exclusive of any and all power thereover on the part of the states.[9] But the grant of power over foreign commerce is conferred by the same words, the very identical words, which confer the power over interstate commerce. The one phrase, "The Congress shall have power: To regulate commerce," is applied to both "commerce among the states" and "with

[9] *Chy Lung* v. *Freeman*, 92 U. S. 275; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Brown* v. *Houston*, 114 U. S. 622; *Crutcher* v. *Kentucky*, 141 U. S. 47.

foreign nations." If it confers exclusive power as to one, it does to the other. It cannot mean two different things at the same time.

It would seem unnecessary to go any further, but the philosophy of Berkeley and Hume denied the existence of material objects, such as tables, chairs, etc., and there is much legal interpretation of a sort which disperses the strongest language as the sun disperses snow.

Therefore, if we admit that it is possible for the same words to mean two different inconsistent things at the same time, and that the general grant may not be general but may be two particular grants each less than general, to what are we led?

There is not a word in the Constitution to show where the division line is to be drawn, not a word to show over what subjects or classes of subjects the states retain sovereignty, and over what subjects they granted away their sovereignty to Congress. The court says that at least as to all matters permitting or requiring but one uniform or national plan of regulation the power of Congress is exclusive, and has suggested that as to local matters the states have concurrent power. But the Constitution does not distinguish these subjects from each other.

If the court has created this distinction, and has committed itself to it as a basis of decision, it has assumed arbitrary power of legislation rising to the height of amendment of the Constitution. It has amended the Constitution by reading into it a division of the subjects of commerce which the Constitution does not make.

This division is as arbitrary as it would be for the court to hold that the subjects of commerce and the power of regulation of them are divided on the basis that the states can regulate all commerce while within their respective limits, whether in the course of interstate transportation or not, provided that their regulations do not extend to commerce, or affect the conduct of carriers and other agents of commerce, beyond the territorial limits of the respective states; but that Congress has exclusive power to impose

regulations extending over commerce, or controlling its agents, in more than one state.

For instance, on this division of the grant local license requirements regulating the sale of interstate goods would be constitutional. The early prohibition statutes would have been held constitutional, and the Wilson Act, which afterwards permitted the states to pass such laws, would have been unnecessary. So, also, the State Freight Tax Case,[10] in which Pennsylvania attempted to impose a transportation tax per ton on all freight while in transit within the state, would have been held constitutional. A statute, however, such as the statute of Indiana, in *Western Union Telegraph Co.* v. *Pendleton*,[11] which required telegraph companies to deliver messages where the addressee lives within a mile of the telegraph station or in the town, and applied not only to messages received in Indiana for delivery in Indiana, but also to messages received in Indiana for delivery in other states, would be held unconstitutional in so far as it attempted to control the conduct of telegraph companies beyond the state of Indiana.

Again, the court might with equal ease hold that the states can regulate while in their respective territories all commerce beginning or ending within their limits, on the ground that such commerce is an integral part of the commerce of the respective states; but that they cannot regulate commerce passing entirely through their territorial limits, because the regulation of that belongs to Congress alone. It is too obvious to need illustration that on this division of the grant many of the decisions of the court could not stand.

Here, then, are three possible divisions of the grant among the many which can be conceived. The Constitution does not create one of them. It confers the commercial power upon Congress in a few brief words of general grant. If the court has or should divide the grant and promulgate one of these three, or of the many other possible divisions

---

[10] 15 Wal. 232.
[11] 122 U. S. 347.

of the grant, it has or would amend the Constitution of its own choice, unrestricted by anything save its own pleasure and wisdom.

We should be loath to admit that the court has committed itself to a position which is in effect an amendment to the Constitution.

But if we ignore both the historic reasons for the grant and the historic fact of the immediate and universally accepted meaning of the grant, and if we concede that the identical words mean one thing as to foreign and another as to interstate commerce, that the general grant may be divided, and that the court has arbitrarily created and committed itself to one of several possible divisions of the subject not found in the Constitution, we are still left in a very uncomfortable position.

If it be true that the court has practically amended the Constitution by dividing the grant, and has given Congress and the states concurrent power over matters permitting of local control, and Congress exclusive control over matters requiring uniform control, it is certain that there are no guiding principles in the commerce clause, or any other part of the Constitution, or in any decisions of the court so far rendered by which to determine what subjects fall within one class and what within the other.

Consequently the court must either further amend the Constitution by formulating such principles, or else, so far as the Constitution is concerned, remain free to decide in any case, apart from the few precedents it has established, according to the ideas of expediency and of the interests of the country which may prevail in the court from time to time. In the latter case, individuals, corporations, and state legislatures would be left without guiding principles of law by which their acts would be judged, and must await and submit to the arbitrary decision of the court.

That is not in harmony with the English system of jurisprudence.

These considerations of general principles lead to the conclusion that only the exclusive theory is sound. Briefly reviewed, they are: that historically the purpose of the

commerce clause was to free commerce from control by the states; that the historic fact is that it was immediately so accepted, and all state regulations fell; that it is admitted that Congress has exclusive power over foreign commerce, and that since the same words grant power over interstate commerce Congress must have exclusive power over it also; that the grant is a general one and not a divided one; that it would be arbitrary amendment of the Constitution for the court to divide it; that it would be as much so to divide it according to the local concurrent powers theory as according to any other possible division; that if the court should divide the grant and establish two classes of subjects of commerce, it would be necessary that the subjects be classified according to established general principles, and that as such principles are not contained in the Constitution it would be still further amendment of the Constitution for it to formulate them, and that without so doing the court would be without Constitutional restraint in this respect.

Proceeding from general principles to the question what theory the court has in fact adopted, it cannot be contended that it has adopted the general concurrent theory. On the other hand, that it has practically adopted the exclusive-reserved powers theory, and not only has not committed itself to the local concurrent theory, but has by implication negatived it, appears from several facts.

In the first place, although Mr. Justice Curtis did set up the local concurrent powers theory, and some justices have since followed him, and there is much of the reasoning of that theory in the opinions, yet other justices frequently question it, and there is much reasoning against it. Thus in 1875 the court, in an opinion by Mr. Justice Miller,[12] said,—

"But this doctrine has always been controverted by this court, and has seldom, if ever, been stated without dissent." While in 1889 Mr. Chief-Justice Fuller,[13] in an opinion quoted on page 548, showed very clearly that the so-called

[12] *Henderson* v. *Mayor of New York*, 92 U. S. 259.
[13] *Leisy* v. *Hardin*, 135 U. S. 100.

exercise by the states of direct concurrent power over interstate commerce in local affairs is nothing more than the exercise of their reserved powers indirectly affecting commerce.

And even in cases which do not actively controvert the theory, it is frequently questioned and practically thrust aside, being stated tentatively in effect thus: "If there be a class of cases as to which the states have concurrent powers, at least as to the class of subjects of which this case is one, Congress has exclusive jurisdiction."

On the other hand, an express decision that the power of Congress is not exclusive will be looked for in vain.

Secondly, the court has never, in fact, formulated any general principles by which to determine what subjects are in a local and what in a national class. Without this the theory is incomplete.

Mr. David Walter Brown, writing in the *Columbia Law Review* for November, 1904, recognizes this lack of general principles and offers some well-considered suggestions to supply them.

But we submit that the remedy does not lie in suggestions to the court to proceed further in making its own grant and division of the commercial power, but in recognizing that the Constitution has made the grant, and has not left it to the court to grant it or divide it in its wisdom. The remedy lies in pointing out the fact that though the court has at times shown a disposition to substitute a division of its own creation of the commercial power into two classes which would leave it free to subject commerce to concurrent state power or exclusively to Federal power at will according to its own ideas, it has in the main recognized the fact that the Constitution by one general grant has given the entire and exclusive power of direct regulation of interstate commerce to Congress.

Thirdly, the decisions of the court, with comparatively few exceptions, are in harmony with the exclusive-reserved powers theory, whereas a very great number, including many of the most important ones, are inconsistent with the local concurrent powers theory.

It is this great fact which, more than the written opin-

ions of the court and in spite of some of them, shows that the court has in fact, in its actual decisions, practically acted upon the exclusive-reserved powers theory and negatived the local concurrent powers theory.

The cases fall naturally into two classes—states statutes held constitutional, and state statutes held unconstitutional.

The state statutes held constitutional may be sustained on the exclusive-reserved powers theory, and it is unnecessary to base their validity upon a power in the states to regulate commerce. With few exceptions they have been statutes upon such subjects as roads, ferries, bridges, wharves, pilotage, inspection, quarantine, etc., all subjects over which, as is pointed out by Chief-Justice Marshall in *Gibbons* v. *Ogden*, " no direct power is given to Congress, and which therefore remain subject to state legislation." Undoubtedly legislation on these subjects indirectly regulates commerce, but since such legislation is within the reserved powers of the states, it is unnecessary, and seems contrary to the fact, to call it direct regulation of commerce, and assert that its authority is derived from a power to regulate commerce.

Chief-Justice Marshall, as previously quoted in part, says in the same case:

" So if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the states and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality."

And Mr. Chief-Justice Fuller, in *Leisy* v. *Hardin*,[14] shows

[14] 132 U. S. 100.

that the so-called permissible direct regulations by states of commerce in local affairs are really only the exercise by the states of their reserved powers indirectly regulating commerce. He says:

"After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the states and the exercise of power over purely local commerce and local concerns."

. . . . . .

"The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end.

"These decisions rest upon the undoubted right of the states of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the National Government."

This makes it evident that the cases where state statutes have been sustained are consistent wth the exclusive-reserved powers theory, and are in reality based on it, even though the opinions in some cases are based on a supposed local concurrent powers theory. It also goes to the very base of the latter theory, and removes its foundation at one stroke by showing that the supposed local direct regulations by states are merely indirect regulations resulting from the legitimate exercise by the states of their reserved powers.

The state statutes held unconstitutional present a direct issue between state power and Federal power. Unlike the past cases, the two theories do not in these cases lead to the same result, but to different results. The conflict is a direct one. They are cases of regulation of interstate commerce, which though local are necessarily direct, and can flow only from a power to regulate commerce.

The actual decisions in these cases with few exceptions

are consistent only with the exclusive-reserved powers theory.

This fact leads to the most important conclusion that, generally speaking, the court has decided in accordance with the exclusive-reserved powers theory and contrary to the local concurrent powers theory whenever the two theories have come into direct conflict. The exceptions, though important, have not been sufficiently numerous to weigh seriously against the conclusion.

To appreciate the full significance of the decisions in these cases it is necessary to first consider the grounds on which must be based the division between the subjects of commerce which is asserted as the basis of the local concurrent powers theory. This is the division into those subjects which permit of local and those which require one uniform or national system of regulation.

From a theoretical standpoint we have seen that no such division is made in the Constitution, and that for the court to make it would be to amend the Constitution by judicial legislation. Further, that if the division be made, there are no general principles to be found in the Constitution by which to fix its nature and decide what subjects fall within one class and what within the other. In the present consideration of what the court has actually done, if we grant, as we must, that it has at times announced such a division, we may still say that it has never announced any such general principles.

Therefore, in order to determine whether we are correct or not in saying that the court in the only cases presenting a direct conflict between the two theories, which are the cases now under consideration, has not as a matter of fact followed this division, it becomes of the greatest importance to determine what must be the nature of the division. This is the crucial consideration in reaching a conclusion on this point.

The division of the subjects of commerce into those permitting of local and those requiring one uniform or national system of regulation must be based on something in the nature of the subjects themselves. It cannot be a division,

depending solely on the pleasure of the court, between subjects which in its wisdom it thinks ought to be subject to local control, and those which it thinks ought to be subject only to national control. That would so obviously place the court above the Constitution, and give it the power to dispose of sovereignty over commerce at its will, subjecting commerce to concurrent state control or exclusively to national control according to its ideas of expediency and wisdom, that it is not to be thought of for a moment. It would mean that no case would be determined according to previously established principles of law, but must await the pleasure of the court. It would mean that from the smallest business man to the largest company, from the most insignificant common carrier to the most far-reaching, no interstate business could be conducted, with any knowledge whether the business might be hampered or destroyed by a state or states in favor of local business or policy, or whether Congress alone would be given power to regulate it, until an actual case involving that very business, or perhaps many cases involving many phases of it, had arisen and been carried to this court for final legislative adjudication.

To merely state such a proposition is to disprove it. The court is a court, adjudicating cases according to pre-established principles of law, not a legislature meeting each situation as it arises, according to expediency at the time. Though "judicial legislation" must unavoidably occur incidentally, to some extent, it can never be claimed by the court as an open and arbitrary right, nor extend to the foundation of one of the most important provisions of the Constitution.

If the division is made at all, it must be between those subjects which by their nature permit of local regulation and those which by their nature require one uniform or national system of control.

The local concurrent powers theory can in this connection be stated thus: All subjects which by their nature permit of local control are subject to concurrent state con-

trol; all which by their nature permit of only national control are subject exclusively to control by Congress.

But the court in the cases we are considering has decided that certain subjects, which by their nature obviously permit of local control, are not subject to concurrent state control, but exclusively to control by Congress. Thereby the court has negatived that theory, and has shown that it does not in its actual decisions make or follow that alleged division of the subjects of interstate commerce.

These cases are many and important. The most numerous of them are the three lines of cases previously specially mentioned, regulation of transportation rates and charges, taxation, and license requirements for sale of interstate goods. Owing to the development of steam transportation both by land and water and the increase of foreign and domestic commerce these lines of cases comprise a large proportion of the decisions of the court under the commerce clause, include many of its most important ones.

Railroad rates vary in different parts of the country. They are not the same in mountainous and in flat regions; nor in thinly and densely populated regions; nor where affected by competition or special trade or market conditions and where not so affected. Through rates are made up by a combination of local rates. Domestic steamship and steamboat rates vary according to the nature of the waters traversed, the amount of traffic, competition, accommodations afforded, etc. Yet in the face of the fact that transportation rates and charges all permit of local regulation the court holds that the states cannot regulate them. And in the face of the fact that they do not permit of one uniform regulation the court has held that Congress can regulate them and has the exclusive power to do so.

License regulations and taxes are essentially local. Various prohibition and liquor license regulations exist to-day in the different states. There are countless other license regulations which it would be possible to impose on all kinds of business in the states and in the cities or localities thereof. Taxes may be of so local a nature that they can be imposed on commerce in every state, county, city, or borough thereof.

Yet in the face of this the court holds that the states cannot impose license regulations for the sale of interstate goods or tax interstate commerce.

These three most important lines of decisions, as likewise all the class of cases of which they form a part, are thus directly opposed to the local concurrent sovereignty theory. The fact, previously mentioned, that in the opinions in such cases that theory is at times reasserted by confusion of reasoning does not alter the fact that the actual decisions are inconsistent with it.

This inconsistency will be clearly seen in the sharp light of contrast by a comparison of the case of *Crandall* v. *Nevada*,[15] which was the first case involving a question of this kind after *Cooley* v. *Wardens, supra,* and which logically applied and followed the local concurrent powers theory as announced in that case, with a long line of subsequent cases decided contrary to its logic.

In *Crandall* v. *Nevada* the question involved was the constitutionality of a statute of the state imposing a tax upon railroad and stage companies of one dollar for every passenger carried out of the state.

The court in following *Cooley* v. *Wardens* applied the local concurrent theory logically to the following effect.

The power of Congress to make national regulations of commerce is exclusive, but the states may make local regulations not amounting to national regulations. The statute in this case does "not institute any regulation of commerce of a national character." It is therefore not in violation of the commerce clause.

This was the unspeakable logic of the syllogism. It was the necessary application of the theory of *Cooley* v. *Wardens* if that theory was to be followed.

Had the court seen any escape from this logic, or possibility of reaching another decision under this theory, it would have taken advantage of it; for to avoid the evils of such a decision it went to the extreme length of holding the statute unconstitutional as being inconsistent with the

[15] 6 Wal. 35 (1867).

objects for which the Federal Government was established in that it interfered with the right of the Government to summon its citizens, and the right of the citizens to go to the seat of Government in Washington, to the halls of Congress, etc., and also the right of the Government to transport troops.

Subsequently, however, evidently realizing that a way around the logic of this case could not always be found, and foreseeing the disastrous results to which it would lead, and to what extent it would re-establish the burdens of local control, the court soon retraced its steps and reversed the logic of *Crandall* v. *Nevada* in respect to the application of the theory of *Cooley* v. *Wardens*.

To have followed that case and to have subjected commerce, then well on its way to its present tremendous development, to a logical application of that theory would have resubjected interstate carriers, both by land and by water, to that control by the states from which the commerce clause was designed to free them. It would have placed the sale of interstate goods at the mercy of the states. It would have restored to the states power to tax interstate business out of existence within their limits in favor of local business.

In fact, it is difficult to conceive of any interstate commerce the rates and charges for that part of which is done within a state could not be locally regulated by the state, which could not be taxed locally by the state, and for the transaction of which local license requirements could not be imposed. It is therefore not too much to say that the local concurrent powers theory of *Cooley* v. *Wardens*, as logically followed and applied in *Crandall* v. *Nevada*, would, if persisted in, practically have resubjected all interstate commerce to control by the states.

It is not to be wondered at that the court shrank from such consequences and has not followed that case.

Unfortunately, it did not at the same time overrule and eliminate the theory on which the conclusion in this respect was based. When this application of the theory in *Crandall* v. *Nevada* was departed from, the theory of *Cooley* v. *Wardens* was not expressly discarded. On the contrary, it

was apparently allowed to remain, and has continued through many of the opinions though decision after decision contrary to its logical application has been handed down.

The result has been that confusion of reasoning has taken the place of the clear-cut syllogistic logic of *Crandall* v. *Nevada*, and the theory of *Cooley* v. *Wardens* has been reasserted as the basis of decisions which are the direct opposite of the logical application of that theory. It is for that reason we say that although the local concurrent powers theory is thus reasserted in the opinions, the great majority of the actual decisions of the court are against it, and that in those particular lines of cases where the theories lead to different results the decisions are overwhelmingly against it.

Reviewing, then, what the court has actually done, we find:

That it has twice overruled the general concurrent powers theory and has so far discarded it that it would be safe to ignore it, were it not for one recent important decision.

That the local concurrent powers theory has always been hotly disputed, and is stated tentatively and in effect waived aside even in many cases which do not expressly controvert it. That in those cases where this and the exclusive theory lead to the same results the decisions are equally supportable upon the latter theory as upon this. That in those cases where these two theories lead to opposite results, which are numerous and most important, the actual decisions of the court have been uniformly inconsistent with the former and consistent with the latter theory.

That the exclusive theory, notwithstanding reasoning inconsistent therewith in many of the opinions, is consistent with all of the decisions of the court except comparatively few, and is the only theory with which the decisions of the court in fact harmonize.

The conclusion seems justified that on general principles the court should, and that, in fact, in its decisions it has, generally speaking, followed the exclusive theory.

PART II.

The development, discussion, and ultimate disposition of the different theories as above can be traced only by a close chronological reading of the opinions with a view not only to their express language, but particularly to the fundamental reasoning on which they are based.

This requires quotation of the opinions at considerable length. In fact, to develop the subject adequately requires more space than can here be occupied, though sufficient space can be given for the most important opinions.

The doctrine of the silence of Congress will not be gone into. It depends on what theory of exclusiveness is held. If the power of Congress is exclusive, all direct regulations by the states are void, whether Congress is silent or not, thought indirect regulations stand or fall as Congress is silent on the subject or not. If the states have general concurrent power, then all state regulations, both direct and indirect, are valid in the silence of Congress. If the states have local concurrent power, the silence of Congress in matters requiring national control can confer no rights of direct regulation on the states, but in local matters it can. There is a corollary doctrine that when Congress speaks on part of a subject it is equivalent to a declaration that the remainder shall be free, but this, too, depends upon the theories of exclusiveness.

These doctrines, in their varying and conflicting forms, are another reason for the express abolition of two of the theories of exclusiveness.

The cases here follow, with running comments on them:

REVIEW OF THE CASES.

Gibbons v. *Ogden*, 9 Wheaton 1 (1824).

This is the first case in which the question of the respective powers of Congress and the states is reviewed. It involved the power of the state of New York to grant an exclusive license to navigate the waters of that state in vessels propelled by steam. In a strong decision by Chief-Justice

Marshall several points were so clearly demonstrated as to remain unquestioned ever since. In the first place, it decided that commerce means more than buying and selling or the interchange of commodities, that it comprehends navigation, and that "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse." Secondly, it decides that in the grant of power over "commerce among the several states" "the word 'among' means intermingled with . . . Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior." And also "In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. . . . If Congress has the power to regulate it, that power must be exercised wherever the subject exists."

On the broad and fundamental question of the division of power over commerce between the Federal and state Governments the court proceeds to demonstrate, and practically decides, that the power over interstate and foreign commerce granted to Congress is exclusive of any and all power over that subject by or on the part of the states. But on account of an expression to the effect that a decision of that point was not necessary in the case because, at all events, Congress had legislated on the subject, and its enactment must be supreme, a dispute subsequently arose and was for some time waged in the opinions and dissenting opinions of this court and its justices, whether the court did or did not by this case decide that the grant to Congress of this power is exclusive.

The language of the opinion on this point is as follows:

"But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."

. . . . . .

"That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a

power to regulate commerce is the source from which the right to pass them is derived cannot be admitted."

. . . . . .

"They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the General Government: all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

"No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given."

. . . . . .

"So, if a state, in passing laws on subjects acknowledged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In our complex system . . . contests respecting power must arise. Were it ever otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might, sometimes, interfere. This, however, does not prove that

the one is exercising, or has a right to exercise, the powers of the other."

From this it will be seen that the principles which we set out to show are the true and enduring principles decided by the cases were advanced and are argued almost to the point of demonstration, and were practically decided by the court, in this celebrated opinion by Chief-Justice Marshall. A sharp line was there drawn between the exclusive power of Congress over interstate commerce and the exclusive power of the states each over its internal commerce.

It was shown that neither one can exercise the power of the other. Also because of the complexity of our system the states must be permitted in exercising their own powers to indirectly affect the subjects of interstate and foreign commerce. But they cannot affect the power of Congress over that commerce, because the power of Congress is supreme and must prevail.

The distinction between indirectly affecting subjects of interstate commerce and exercising or indirectly affecting the power over it is important. The idea may be expressed thus: Congress has exclusive power over interstate commerce, therefore a state cannot exercise that power. The acts of Congress within its powers are supreme, therefore a state cannot indirectly affect or regulate the exercise of that power by Congress. But our system is so complex that a state cannot possibly exercise its reserved powers without indirectly affecting subjects of interstate or foreign commerce, therefore it must be permitted to do so when it does not affect the exercise of power by Congress.

We thus have completely developed and expounded in this case the *exclusive-reserved powers theory.*

Brown v. *Maryland,* 12 Wheaton, 419 (1827).

This case involved the validity of an act of Maryland requiring all importers of foreign articles or commodities to take out a license and pay a fee therefor before they would be allowed to sell the same. The opinion in this case is also by Chief-Justice Marshall. After again referring to

the conflicting regulations of commerce among the confederated states he says:

"It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, a matter of surprise that the grant should be extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which rose from a full conviction of its necessity."

. . . . . .

"What would be the language of a foreign government which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported?"

. . . . . .

"Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the states is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside, not how or will it be probably abused? The power claimed by the state is in its nature in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."

. . . . . .

"The Act of . . . Maryland . . . is repugnant to the Constitution of the United States and, consequently, void."

Here is an express statement that the power in question has not been confided to the States, but given to Congress,

and that the extent to which it may be exercised does not enter into the question of its existence. This case supports the *exclusive-reserved powers theory.*

It might have been supposed that these two cases had settled that the power in Congress is exclusive, but there followed a case near the border line of local direct regulation, in which the opinion is not conclusive, and another in which the question is treated as an open one.

Willson et al. v. *Black Bird Creek Marsh Co.*, 2 Peters, 245 (1829).

This case involved the constitutionality of an act of Delaware authorizing the construction of a drainage dam across a small, sluggish tidal stream running through a pestilential marsh.

The court in an opinion by Chief-Justice Marshall held that measures such as these "are undoubtedly within those which are reserved to the states;" that the abridgment of the use of the stream is an affair between the state and its citizens unless in conflict with the Constitution or a law of the United States; that Congress has not legislated on the subject; and that the act authorizing the dam cannot, "under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state."

The damming of a navigable stream is very close to direct regulation of interstate commerce, and yet "under all the circumstances of the case" any interference that may have been caused to commerce by this dam seems to have been so incidental and trifling that the court appears to treat it as a negligible quantity. The decision appears to rest on the special circumstances of the case, but as the measure is pronounced a reserved measure, and the question of conflict with the *dormant* power of Congress is considered, which question could arise in the case of such a purely local regulation only on the exclusive theory, the case must be classified as based on *the exclusive-reserved powers theory.*

City of New York v. *Miln*, 11 Peters, 102 (1837).

The question involved was the constitutionality of a statute of New York requiring reports from masters of in-

coming vessels as to name, place of birth, last legal settlement, etc., of passengers.

The majority of the court, notwithstanding the two previous cases, seemed to consider that the question whether the power to regulate interstate commerce in Congress is or is not exclusive was an open question, which it was not necessary for them to decide, because they say: "We are of opinion that the act is not a regulation of commerce, but of police, and that being thus considered it was passed in the exercise of a power which rightfully belongs to the states." . . . "It is apparent from the whole scope of the law that, etc." . . . "and for the purpose a report was required of the names, places of birth, of all passengers, that the necessary steps might be taken by the city authorities to prevent them from becoming charges as paupers.

"Now, we hold that both the end and the means here used are within the competency of the states, since a portion of their powers were surrendered to the Federal Government. Let us see what powers are left with the states."

. . . . . .

"We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship the crew of which may be laboring under an infectious disease."

. . . . . .

"We are therefore of opinion that . . . the act . . . does not assume to regulate commerce . . . and is constitutional."

It will be seen that the reasoning in this case is consistent with the foregoing cases in that it holds with them that the exercise by a state of one of its acknowledged powers is not invalid because of an indirect regulation of interstate commerce. Justice Story in a strong dissenting opinion differs with his colleagues not in theory, but in application of the theory to the facts of the case. He goes the full length of

the argument and practical decision of Chief-Justice Marshall in the previous cases, and shows that the Chief-Justice intended to rule that the power of Congress is exclusive. Tested by this, he considered the statute unconstitutional because it applied not only to passengers who arrive at New York, but also to all who have been landed at places out of the territorial limits of New York. His language is as follows:

"It has been argued that the power of Congress to regulate commerce is not exclusive, but concurrent with that of the states. If this were a new question in this court, wholly untouched by doctrine or decision, I should not hesitate to go into a full examination of all the grounds upon which concurrent authority is attempted to be maintained. But in point of fact, the whole argument on this very question, as presented by the learned counsel on the present occasion, was presented by the learned counsel who argued the case of *Gibbons* v. *Ogden*,[16] and it was then deliberately examined and deemed inadmissible by the court. Mr. Chief-Justice Marshall, with his accustomed accuracy and fulness of illustration, reviewed at that time the whole grounds of the controversy, and from that time to the present the question has been considered (as far as I know) to be at rest. The power given to Congress to regulate commerce with foreign nations and among the states has been deemed exclusive, from the nature and objects of the power, and the necessary implications growing out of its exercise."

. . . . . .

"In this opinion I have the consolation to know that I had the entire concurrence, upon the same grounds, of that great constitutional jurist, the late Mr. Chief-Justice Marshall. Having heard the former arguments, his deliberate opinion was that the act of New York was unconstitutional and that the present case fell directly within the principles established in the case of *Gibbons* v. *Ogden*[17] and *Brown* v. *The State of Maryland*." [18]

[16] 9 Wheaton R. 1.
[17] 9 Wheat. R. 1.
[18] 12 Wheat. R. 419.

Mention in the above of the argument that the states have concurrent power with Congress to regulate commerce is worthy of special note.

This theory was passed by without decision by the majority of the court, but is thus refuted by Mr. Justice Story. In subsequent decisions it will be seen that this theory was again advanced and introduced much confusion into the reasoning of the court and of individual justices. This case may also be classified as supporting the *exclusive-reserved powers theory.*

Groves et al. v. *Slaughter,* 15 Peters, 505 (1841).

The conflict between the exclusive theory and the concurrent sovereignty theory takes decided form in this case. The question involved the validity of the Constitution of Mississippi, providing that "the importation of slaves shall be prohibited from and after May 1, 1833."

It was held that this was not operative without action by the legislature. However, McLean, J., in concurring gave his views on the question of interference with interstate commerce as follows:

. . . . . .

"In the case of *Gibbons* v. *Ogden* this court decided that the power to regulate commerce is exclusively vested in Congress, and that no part of it can be exercised by a state."

. . . . . .

"It has been contended that a state may exercise a commercial power if the same has not been exercised by Congress. And that this power of the state ceased when the Federal authority was exerted over the same subject matter.

"This argument is founded upon a supposition that a state may exercise a power which is expressly given to the Federal Government, if it shall not exert the power in all the modes and over all the subjects to which it can be applied. If this rule of construction were generally adopted and practically enforced, it would be as fatal to the spirit of the Constitution as it is opposed to its letter."

It will be noted that it is here considered that *Gibbons* v. *Ogden* decided that the power of Congress is exclusive.

Chief-Justice Taney, on the contrary, in a concurring opinion treats this as an open question and broaches the general concurrent sovereignty theory, though avoiding a decision on it. His language is:

"But the question upon which the different opinions have been entertained is this: Would a regulation of commerce, by a state, be valid until Congress should otherwise direct: provided such regulation was consistent with the regulations of Congress, and did not in any manner conflict with them.

"No case has yet arisen which made it necessary, in the judgment of the court, to decide this question. It was treated as an open one in the case *The City of New York* v. *Miln*,[19] decided at January Term, 1837, as will appear by the opinions then delivered; and since that time the point has never, in any form, come before the court. Nor am I aware that there is any reason for supposing that such a case is likely to arise. For the states have very little temptation to make a regulation of commerce when they know that it may be immediately annulled by an act of Congress, even if it does not at the time it is made by the state conflict with any law of the General Government."

This is followed by an opinion by Baldwin, J., who states in as strong language as can well be employed that it has been conclusively settled that the power of Congress is exclusive. His language on this point is:

"That the power of Congress 'to regulate commerce among the several states' is exclusive of any interference by the states, has been, in my opinion, conclusively settled by the solemn opinions of this court in *Gibbons* v. *Ogden*[20] and in *Brown* v. *Maryland*.[21] If these decisions are not to be taken as the established construction of this clause of the Constitution, I know of none which are not yet open to doubt; nor can there be any adjudications of this court, which must be considered as authoritative upon any question, if these are not to be so on this."

"Causes may, indeed, arise wherein there may be found

[19] 11 Peters, 102.
[20] 9 Wheat. 186–222.
[21] 12 Wheat. 438–446.

difficulty in discriminating between regulations of 'commerce among the several states' and the regulations of 'the internal police of a state;' but the subject matter of such regulations, of either description, will lead to the true line which separates them when they are examined with a disposition to avoid a collision between the powers granted to the Federal Government, by the people of the several states, and those which they have reserved exclusively to themselves. 'Commerce among the states,' as defined by this court, is 'trade,' 'traffic,' 'intercourse,' and dealing in articles of commerce between states, by its citizens or others, and carried on in more than one state. Police relates only to the internal concerns of one state, and commerce within it is purely a matter of internal regulation, when confined to those articles which have become so distributed as to form items in the common mass of property. It follows that any regulation which affects the commercial intercourse between any two or more states, referring solely thereto, is within the powers granted exclusively to Congress; and that those regulations which affect only the commerce carried on within one state, or which refer only to subjects of internal police, are within the powers reserved."

The conflict here displayed between the theories is continued in,

The License Cases, 5 Howard, 504 (1847).

Taney, C. J., says:

"Each of the cases has arisen upon state laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories by prohibiting their sale in small quantities and without licenses previously obtained from the state authorities. And the validity of each of them has been drawn in question upon the ground that it is repugnant to that part of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several states."

. . . . . .

"The question, therefore, brought up for decision is, . . . (or) in other words, whether the grant of the power to

Congress is of itself a prohibition to the states, and renders all state laws upon the subject null and void. . . . It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear that the mere grant of power to the General Government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the states. The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon Congress. Yet, in my judgment, the state may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory, and such regulations are valid unless they come in conflict with a law of Congress."

. . . . . .

"It has been said, indeed, that quarantine and health laws are passed by the states, not by virtue of a power to regulate commerce, but by virtue of their police powers and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offences or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power—that is to say, the power of sovereignty, the power to govern men within the limits of its own dominions. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. And when the validity of a state

law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the state from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

"Upon this question the object and motive of the state are of no importance and cannot influence the decision. It is a question of power.

"Are the states absolutely prohibited by the Constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the state, or whatever the real object of the law, and it requires no law of Congress to control or annul them. Yet the case of *Gibbons* v. *Ogden* unquestionably affirms that such regulations may be made by a state, subject to the controlling power of Congress. And if this may be done, it necessarily follows that the grant of power to the Federal Government is not an absolute and entire prohibition to the states, but merely confers upon Congress the superior and controlling power."

It is to be noted that the concurrent sovereignty theory is here fully expounded and carried to its ultimate and logical limits, and it is held that the state has sovereign power to regulate interstate and foreign commerce in the absence of regulation by Congress; that this is a part of the sovereignty of the state which was never yielded to Congress, but merely made subject to the concurrent sovereignty of Congress over this subject whenever Congress chooses to exercise its sovereignty. Also, that the object and purpose cannot be inquired into as to whether it is for any other purpose or "to make regulations of commerce for the interest and convenience of trade." In other words, a sovereign power exists to make regulations of commerce, both interstate and foreign, subject only to the power of Congress when exercised. If this theory be sound, a state can make within its own limits any regulation of interstate or foreign commerce whatsoever, merely because it wills to do so,

provided Congress has not legislated on the same subject. The sovereignty of each state over that part of interstate and foreign commerce which takes place within its territory is absolutely equal and co-extensive with the sovereignty of Congress thereover, provided only that when the latter sovereignty is actually exercised any conflicting actual exercise of the former must yield. This theory we have termed for convenience *the general concurrent powers theory.*

Cooley v. *Board of Wardens of Philadelphia,* 12 How. 299 (1851).

The court sustained the constitutionality of a statute of Pennsylvania regulating pilots and the taking of pilots by vessels. In doing so the court held that it was a regulation of navigation, and as commerce includes navigation, necessarily also a regulation of commerce. Proceeding to the question whether the Constitution deprives the states of power to regulate pilots, it holds that that question has never been decided by this court, and then introduces a new theory, which we have called the local concurrent powers theory; the language of the court in its opinion by Curtis, J., being:

. . . . . .

"The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter."

. . . . . .

"Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

. . . . . .

"How then can we say, that by the mere grant of power to regulate commerce, the states are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive.

"This would be to affirm that the nature of the power is in any case something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by Congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the states, in conformity with the circumstances of the ports within their limits.

"In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power, what is not true of its subject now in question."

. . . . . .

"It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive power of Congress, or may be regulated by the states in the absence of all Congressional legislation; nor to the general question how far any regulation of a subject by Congress may be deemed to operate as an exclusion of all legislation by the states upon the same subject. We decide the precise questions before us upon what we

deem sound principles, applicable to this particular subject in the state in which the legislation of Congress has left it. We go no further."

Here it will be noted is introduced a new idea, that the power over commerce is to be divided according to the nature of the subjects on which it acts, that is according as they are national or local in their nature. A distinction between the subjects of commerce is substituted for a distinction between the kinds of commerce, whether interstate or intrastate, and between the powers over these two kinds of commerce. And it is held that exclusive power is vested in Congress over " whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation," but to the states is left concurrent power over matters of a local nature. The theory is a new one, the opinion is hesitating, and confines itself, so far as the jurisdiction of the states is concerned, strictly to the determination of the right of a state to regulate pilots, and nothing else.

Mr. Justice McLean in dissenting takes exception to this theory and says:

" That a state may regulate foreign commerce, or commerce among the states, is a doctrine which has been advanced by the individual judges of this court; but never before, I believe, has such a power been sanctioned by the decision of this court."

He considers the statute a regulation of interstate commerce, and therefore void.

Mr. Justice Daniell agreed in the decision, but differed in his reasoning. He held that the power to enact pilot laws, though " in some degree connected with commercial intercourse, does not come essentially and regularly within that power of commercial regulation vested by the Constitution in Congress."

In conclusion he says: " I am forced to conclude that this is an original and inherent power in the states and not one to be merely tolerated, or held subject to the sanction of the Federal Government."

It is submitted that the dissenting opinion by Mr. Justice

McLean adopts the true interpretation of *Gibbons* v. *Ogden*, though it errs in holding that the regulation of pilots is not within the reserved powers of the states; and that the opinion of Mr. Justice Danill sets out the principles on which this case should have been determined, in that it shows that the regulation of pilots is not a direct regulation of commerce, but the exercise of a reserved power of the states, and therefore not an invasion of the power of Congress, which is exclusive.

We thus see that the court distinctly casts aside the general concurrent powers theory, but adopts and advances a modified form of it. It in part also adopts the generally accepted interpretation of *Gibbons* v. *Ogden* so far as to hold that the power of Congress is exclusive as to some things. It is a compromise between the two theories.

The first was that of Chief-Justice Marshall and Mr. Justice Story, which we call the exclusive-reserved powers theory, to the effect that Congress has exclusive power to directly regulate interstate and foreign commerce. The second was that of Chief-Justice Taney, which we call the general concurrent powers theory, to the effect that Congress and the states have general concurrent powers as wide as sovereignty. The new theory of Mr. Justice Curtis, which we call the local concurrent powers theory, is that Congress has an exclusive power as to national subjects of commerce, and Congress and the states a concurrent power as to local.

This attempted combination of two essentially inconsistent theories, it will be seen in the later cases, has since led to much confusion of reasoning.

James S. Rogers.

(To be continued.)